A **GARY TEH CHIN YEONG v. KWONG YAN LOY & ANOR**

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[ORIGINATING SUMMONS NO: BA-24NCVC-1486-12-2018]
25 MARCH 2019

B

CIVIL PROCEDURE: *Affidavit – Paragraphs – Application to expunge paragraphs in affidavit – Whether paragraphs referred to in affidavit privileged and inadmissible as evidence – Defendants' failure to file application under O. 41 r. 6 of Rules of Court 2012 – Whether defendants waived their right to object*

C

The first defendant and his wife were co-owners of a semi-detached house erected on a piece of land ('property'). The co-owners had assigned the ownership of the property to Public Bank Bhd ('bank') to secure repayment of a loan granted by the bank to the co-owners ('loan'). The co-owners defaulted upon the loan and the bank proceeded to sell the property by way D of a public auction ('auction'). At the auction, the plaintiff successfully purchased the property and was the registered proprietor of the property. The plaintiff filed this originating summons ('OS') for, among others, an order to compel the defendants to deliver possession of the property to the plaintiff. In support of the OS, the plaintiff affirmed an affidavit ('plaintiff's first E affidavit') which had referred to without prejudice negotiations. The first defendant affirmed an affidavit on behalf of the defendants ('defendants' first affidavit') to oppose the OS which exhibited screenshots of emails and WhatsApp messages between the plaintiff and the first defendant regarding without prejudice negotiations. In response to the defendants' first affidavit, F the plaintiff affirmed an affidavit ('plaintiff's second affidavit') which averred to matters concerning without prejudice negotiations. Upon receipt of the plaintiff's second affidavit, the defendants filed encl. 7 for, among others, a court order to expunge the averments and exhibits regarding without prejudice negotiations ('plaintiff's second affidavit') on the ground that those G averments and exhibits concerned inadmissible without prejudice negotiations. The issue that arose was whether the defendants had waived their right to object to the admissibility of without prejudice negotiations contained in the plaintiff's affidavit.

Held (dismissing encl. 7 with costs):

H

(1) The plaintiff's first affidavit contained inadmissible without prejudice negotiations. However, the defendant did not file any application under O. 41 r. 6 of the Rules of Court 2012 to expunge the averment and exhibit regarding without prejudice negotiations. Instead, the defendants' first affidavit, in reply to the plaintiff's first affidavit, made I further allegations and exhibited screenshots of emails and WhatsApp messages regarding without prejudice negotiations. Thus, there was a

waiver by the defendant. In view of this, the defendants could not now apply to strike out the averments and exhibits regarding without prejudice negotiations. (paras 15 & 17)

Case(s) referred to:
Cutts v. Head & Anor [1984] 2 Ch 290 ***(refd)***
Greenline-Onyx Envirotech Phils Inc v. Otto Systems Singapore Pte Ltd [2007] 3 SLR 40 ***(refd)***
Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd [2013] 3 CLJ 47 CA ***(refd)***
Lim Tjoen Kong v. A-B Chew Investments Pte Ltd [1991] 3 CLJ 1945; [1991] 4 CLJ (Rep) 550 CA ***(refd)***
Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC ***(refd)***
Maziah Musa v. Zainulabidin Mat Akhir, Dato' & Ors [2014] 1 LNS 1034 HC ***(refd)***
Nulink Solutions Sdn Bhd v. Afdilia Holdings Sdn Bhd [2016] 1 LNS 1244 HC ***(refd)***
Singham Sulaiman Sdn Bhd v. Appraisal Propery Management Sdn Bhd & Anor And Another Case [2018] 1 LNS 277 HC ***(refd)***
Somatra Ltd & Ors v. Sinclair Roche & Temperley [2000] 2 Llyod's Rep 673 ***(refd)***
Wee Building Materials Sdn Bhd v. Muhamed Maidin [1996] 1 LNS 299 HC ***(refd)***
Yeo Hiap Seng v. Australian Food Corp Pte Ltd & Anor [1991] 1 LNS 19 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 73
Evidence Act 1950, ss. 23, 126(1)
Rules of Court 2012, O. 41 r. 6
Rules of the Court of Appeal 1994, r. 13

Evidence Act (Cap 97) [Sing], s. 23
Rules of Court [Sing], O. 41 r. 6

For the plaintiff - Thoo Yee Huan; M/s Halim Hong & Quek
For the defendants - Kanesrau Appalanaidu & Elaina Teng Xue Er; M/s Seah Balan Ravi & Co

Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 7)

Wong Kian Kheong J:

Introduction

[1] This is an application in court encl. no. 7 (encl. 7) by the defendants (defendants) in this originating summons (OS) to expunge certain paragraphs and exhibits in an affidavit filed by the plaintiff (plaintiff) in support of the OS.

[2] Enclosure 7 is premised on the ground that the plaintiff has wrongly referred in his affidavit to "without prejudice" negotiations between the parties to settle this dispute amicably (without prejudice negotiations) which is privileged and inadmissible as evidence. The sole issue that arises is whether the defendants have waived their right to object to the admissibility of without prejudice negotiations contained in the plaintiff's affidavit.

A **Background**

[3] The first defendant (first defendant) and his wife are co-owners (co-owners) of a 2½ storey semi-detached house erected on a piece of land held under qualified title HS(D) 224473, PT No. 849 (property). The co-owners' family resides at the property.

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[4] The co-owners had assigned the ownership of the property to Public Bank Bhd (bank) to secure repayment of a loan granted by the bank to the co-owners (loan).

[5] The co-owners defaulted upon the loan and the bank proceeded to sell C the property by way of a public auction (auction).

[6] At the auction, the plaintiff has successfully purchased the property at a price of RM2,000,000. The plaintiff is now the registered proprietor of the property under the National Land Code.

D **[7]** The plaintiff filed this OS for, among others, an order to compel the defendants to deliver possession of the property to the plaintiff. In support of the OS, the plaintiff affirmed an affidavit on 3 December 2018 (plaintiff's first affidavit). Paragraph 9 of the plaintiff's first affidavit had referred to without prejudice negotiations as follows (in Malay and with grammatical errors):

E

> 9. *Saya seterusnya menyatakan bahawa sebagai pemunya berdaftar Hartanah tersebut, pihak saya telah atas dasar "goodwill" cuba untuk mengkehendaki Defendan-defendan tersebut memasuki satu Perjanjian Penyewaan dengan saya sekiranya Defendan-defendan ingin terus mendiami Hartanah tersebut. Namun tiada persetujuan dicapai kerana Defendan-defendan tidak bersetuju kepada terma-*
> F *terma yang dikehendaki dan perjanjian penyewaan tidak berjaya ditandatangani. Sesalinan surat-menyurat antara peguamcara saya dan Tetuan Seah Balan Ravi & Co. dilampirkan dan ditandakan secara kolektif sebagai "Ekshibit E".*
>
> (emphasis added).

G **[8]** Exhibit E in the plaintiff's first affidavit exhibited letters between solicitors for the plaintiff and defendants which contained, among others, without prejudice negotiations.

[9] The first defendant affirmed an affidavit on 27 December 2018 on behalf of the defendants (defendants' first affidavit) to oppose the OS and to H reply to the plaintiff's first affidavit. I reproduce below paras. 9 to 11 and 13 of the defendants' first affidavit (in Malay and with grammatical errors):

> 9. Penglibatan penting saya dengan Plaintif dan peguamcaranya, satu Cik Chloe Lim, adalah seperti berikut:
>
> I (i) Pada atau sekitar 19.05.2018, Plaintif bersama agen hartanah, satu Cik Caryn Wee, telah datang untuk melihat hartanah tersebut berniat untuk membelinya.

(ii) Pada atau sekitar 28.08.2018, Plaintif telah memaklumkan saya bahawa beliau adalah pembida bagi hartanah tersebut dan mencadangkan untuk menyewakan hartanah tersebut kepada saya pada kadar mesra ("friendly rate") di mana saya telah bersetuju dengan cadangan tersebut.

(iii) Saya dan Plaintif telah mencapai suatu persetujuan, inter alia, seperti berikut:

(a) Saya akan menjadi penyewa dalam perjanjian sewa;

(b) Tempoh penyewaan adalah untuk dua (2) tahun dengan pilihan untuk memperbaharui ("option to renew") untuk dua (2) tahun lagi;

(c) Penyewaan pada kadar RM4,000.00 sebulan;

(d) Penyewaan hartanah tersebut akan bermula pada tarikh permulaan perjanjian sewa; dan

(e) Terma-terma lain boleh dirunding

("pengaturan dan pemahaman tersebut")

(iv) Pada atau sekitar 02.10.2018, saya telah menerima satu mesej daripada peguamcara Plaintif, Cik Chloe Lim daripada firma Tetuan Kit & Associates, yang memaklumkan saya, inter alia, bahawa Plaintif telah memaklumkannya bahawa saya bersetuju untuk melaksanakan satu perjanjian sewa.

(v) Melalui mesej lain pada 09.10.2018, Cik Chloe Lim telah memaklumkan saya, inter alia, bahawa penghuni lain hartanah tersebut (iaitu ahli keluarga saya) akan dijadikan penyewa bersama ("co-tenants") dan terma ini tidak boleh dirunding. Saya telah membantah terhadap ini tetapi tidak diendah.

(vi) Pada atau sekitar 04.10.2018, semasa perbualan telefon dengan Cik Chloe Lim, beliau menegaskan, inter alia, bahawa ahli keluarga saya mesti dijadikan penyewa bersama dalam perjanjian sewaan yang saya telah membantah.

Salinan tangkapan skrin ("screenshot") emel, mesej WhatsApp dilampirkan di sini dan ditandakan secara kolektif sebagai ekshibit "KYL-2".

10. Perjanjian sewaan tersebut tidak dapat disempurnakan atas pendesakan Plaintif dan/atau peguamcaranya untuk secara satu pihak ("unilateral") mengubah terma yang dipersetujui, inter alia, bahawa ahli keluarga lain saya dijadikan penyewa bersama dan terma-terma yang dicadangkan tidak boleh dirunding.

11. Sebagai balasan kepada pernyataan di perenggan 9 Afidavit Sokongan tersebut, Plaintif telah gagal bertindak dengan suci hati dan perjanjian sewaan tidak dapat disempurnakan untuk sebab-sebab yang dinyatakan dalam perenggan 9 dan 10 di atas.

…

13. … Oleh kerana keengganan Plaintif untuk mematuhi pengaturan dan pemahaman tersebut, perjanjian sewaan tersebut tidak dapat disempurnakan. Apa-

apa kerugian yang dialami oleh Plaintif (jika ada yang dinafikan), adalah disebabkan oleh keengganan Plaintif untuk memasuki perjanjian sewaan.

(emphasis added).

[10] Exhibit KYL-2 in the defendants' first affidavit exhibited screenshots of emails and WhatsApp messages between the plaintiff and first defendant regarding without prejudice negotiations.

[11] The plaintiff affirmed an affidavit on 16 January 2019 (plaintiff's second affidavit) which responded to the defendants' first affidavit. Paragraphs 8 to 12, 15 and 16 as well as exhs. G and H of the plaintiff's second affidavit averred matters concerning without prejudice negotiations [averments and exhibits regarding without prejudice negotiations (plaintiff's second affidavit)].

Enclosure 7

[12] Upon receipt of the plaintiff's second affidavit, the defendants filed encl. 7 for, among others, a court order to expunge the averments and exhibits regarding without prejudice negotiations (plaintiff's second affidavit) on the ground that those averments and exhibits concerned inadmissible without prejudice negotiations.

Admissibility Of "Without Prejudice" Negotiations As Evidence

[13] Section 23 of the Evidence Act 1950 (EA) provides as follows:

Admissions in civil cases when relevant

s 23. In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given."

(emphasis added).

[14] I am of the following view regarding s. 23 of the EA and the admissibility of "without prejudice" negotiations as evidence:

(i) Section 23 of the EA applies to civil cases and provides that no "admission" is "relevant" if it is made in the following two circumstances:

(a) the admission is made upon an express condition that evidence of the admission is not to be given; and

(b) the admission is made under circumstances from which the court can infer that the parties agreed together that evidence of the admission should not be given.

It is decided in *Singham Sulaiman Sdn Bhd v. Appraisal Property Management Sdn Bhd & Anor And Another Case* [2018] 1 LNS 277; [2018] 10 MLJ 187, at [41], as follows:

"[41] *Section 23 EA bars the admissibility of an "admission". According to s. 17(1) EA, an "admission" is:*

(1) "a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact"; and

(2) the statement is made by any of the persons and under the circumstances mentioned in ss. 18(1), (3)(a), (b), 19 and 20 EA - please see "Evidence - Practice and Procedure", Augustine Paul, 3rd Ed. (2003), at p. 162."

(emphasis added);

(ii) In addition to s. 23 of the EA, Malaysian case law has recognised that as a general rule "without prejudice" negotiations are privileged and cannot be admitted as evidence (general rule). With regard to the general rule, I cite the following judgment of Chang Min Tat FJ in the Federal Court case of *Malayan Banking Bhd v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 MLJ 17, at 18:

> **It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached**.
>
> (emphasis added).

The general rule is based on public policy to encourage litigants to settle their disputes amicably and to this end, litigants should not be discouraged that anything said in the course of negotiations to settle the disputes may be used to their prejudice in court - please see the judgment of Oliver LJ (as he then was) in United Kingdom's (UK) Court of Appeal in *Cutts v. Head & Anor* [1984] 2 Ch 290, at 306;

(iii) If a party has breached the General Rule by affirming an affidavit which contains inadmissible "without prejudice" negotiations, the opposing party may apply to court to expunge such evidence on the ground that such evidence is "irrelevant" (irrelevancy ground) as stated in O. 41 r. 6 of the Rules of Court 2012 (RC). Order 41 r. 6 of the RC provides as follows:

> **The Court may order to be struck out of any affidavit any matter which is** scandalous, irrelevant or otherwise oppressive.
>
> (emphasis added).

In the High Court case of *Wee Building Materials Sdn Bhd v. Muhamed Maidin* [1996] 1 LNS 299; [1997] 3 AMR 2634, at 2639-2640, Haidar bin Mohd Noor J (as he then was) decided as follows:

> *As I rule that the defendant cannot rely on s. 126 [EA] read with O. 41 r. 6 to strike out the matters deposed by Serene Ong, the defendant will have to rely solely on O. 41 r. 6 which prescribes three grounds, namely, scandalous, irrelevant or oppressive. The counsel for the defendant conceded*

that he was relying on the ground - "irrelevant" and possibly - "oppressive". If I understand the submission of counsel for the defendant correctly, he would seem to equate "inadmissible evidence" (by virtue of s. 126 [EA]) as coming under the ground "irrelevant". I do not think this is the correct approach as by s. 2 [EA], the Act is not extended to affidavits. In that event what I have to consider is whether the matters deposed in the affidavit of Serene Ong are irrelevant to the issues for the determination of the Court. Looking at the affidavit of Serene Ong, I do not think it can be said that the matters deposed therein by her are irrelevant to the issues before the Court. I am of the opinion that the defendant cannot rely on this ground.

(emphasis added).

In *Wee Building Materials*, the defendant applied to court to expunge the entire affidavit of an advocate and solicitor, Ms Serene Ong (Ms Ong) on the ground that the affidavit consisted of legally privileged matters which could not be admitted under s. 126(1) of the EA. This expungement application was dismissed by the court because Ms Ong was the solicitor who acted for both the plaintiff company and defendant in a land purchase transaction. As such, Ms Ong was not barred by s. 126(1) of the EA from affirming her affidavit which was relied on by the plaintiff company against the defendant. In *Wee Building Materials*, Ms Ong's affidavit:

(i) was not legally privileged under s. 126(1) of the EA;

(ii) was relevant in that case; and

(iii) should not be struck out as evidence.

In my view, the *ratio decidendi* in *Wee Building Materials* is that the admissibility of an affidavit affirmed by a conveyancing solicitor (who acts for both the vendor and purchaser) regarding the conveyancing transaction, is not barred by s. 126(1) of the EA. *Wee Building Materials* did not decide that a party cannot apply to court pursuant to the irrelevancy ground in O. 41 r. 6 of the RC to expunge an affidavit which contains "without prejudice" negotiations or legally privileged materials.

Our s. 23 of the EA is in *pari materia* with s. 23 of Singapore's Evidence Act. Order 41 r. 6 RC is identical to O. 41 r. 6 of Singapore's Rules of Court. Accordingly, Singapore cases on "without prejudice" negotiations are persuasive and may be referred to in the construction of our s. 23 of the EA and O. 41 r. 6 of the RC.

In the Singapore High Court in *Yeo Hiap Seng v. Australian Food Corp Pte Ltd & Anor* [1991] 1 LNS 19; [1991] 3 MLJ 144, at 146-147, Goh Phai Cheng JC, among others, upheld a decision of the learned Assistant Registrar which expunged certain parts of the plaintiff company's

affidavit regarding "without prejudice" negotiations between the plaintiff company and the first defendant company. *Yeo Hiap Seng* supports the above view that an affidavit containing "without prejudice" communication may be expunged based on the irrelevancy ground in O. 41 r. 6 of the RC; and

(iv) There are certain exceptions to the general rule wherein "without prejudice" communication can be admitted as evidence. This case concerns one exception - when a party has consented to the admissibility of "without prejudice" negotiations, the party has waived the party's right to object to the admissibility of such evidence (waiver). In *Nulink Solutions Sdn Bhd v. Afdilia Holdings Sdn Bhd* [2016] 1 LNS 1244; [2016] 6 AMR 639, at [31(3)], I have followed the judgment of the Singapore Court of Appeal (its apex court) delivered by Chan Sek Keong J (as he then was) in *Lim Tjoen Kong v. A-B Chew Investments Pte Ltd* [1991] 3 CLJ 1945; [1991] 4 CLJ (Rep) 550; [1991] 3 MLJ 4, at 8-9, and decided as follows:

> I am of the view that the "without prejudice" letters are admissible in this case on any one or more of the following grounds:
>
> …
>
> (3) the Respondent had not objected to the "without prejudice" letters at the trial. In fact, the Respondent had relied on certain "without prejudice" letters in this case. As such, the Respondent cannot now object to the admissibility of the "without prejudice" letters in this case - please see the Singapore Court of Appeal's judgment in *Lim Tjoen Kong v. A-B Chew Investments Pte Ltd* [1991] 3 MLJ 4, at 8-9, delivered by Chan Sek Keong J (as he then was).
>
> (emphasis added).

In the course of deciding encl. 7, my research has revealed additional Court of Appeal cases from Singapore and UK regarding waiver as follows:

(a) in *Greenline-Onyx Envirotech Phils Inc v. Otto Systems Singapore Pte Ltd* [2007] 3 SLR 40, at [20]-[22], Chan Sek Keong CJ held that there was a waiver by the appellant company when the appellant company included a letter made in the course of "without prejudice" negotiations in the agreed bundle of documents; and

(b) in *Somatra Ltd & Ors v. Sinclair Roche & Temperley* [2000] 2 Llyod's Rep 673:

(1) the respondents obtained an *ex parte Mareva* injunction against the appellant company based on an affidavit which alluded to certain aspects of "without prejudice" communication;

(2) the appellant applied to adduce all the evidence regarding "without prejudice" negotiations at the trial. This application was resisted by the respondents on the ground that the respondents had not waived their right to object to the admissibility of all "without prejudice" communication; and

(3) a two-member coram of UK's Court of Appeal held that the respondents had waived their right to object to the admissibility of all evidence regarding "without prejudice" negotiations. Clarke LJ (as he then was) decided as follows, at [36] (concurred by Waller LJ):

> [36] *My conclusion as a matter of principle and policy is that where, in support of its case on the merits of an action, a party deploys material which would not be admissible because it forms part of without prejudice communications the other party is entitled to refer to the contents of those same communications in order to advance its own case on the merits. It does not seem to me to be just to allow the first party to obtain an advantage by relying on the without prejudice material in one part of the litigation, as here on an application for Mareva relief, where the merits are relevant, and to rely upon the without prejudice nature of the communications when the other party wished to rely upon, say, an admission made in the same without prejudice discussions at the trial, where the merits are of course also relevant*.
>
> (emphasis added).

Have Defendants Waived Right To Object To The Admissibility Of Without Prejudice Negotiations?

[15] The plaintiff's first affidavit contained inadmissible without prejudice negotiations (averment and exhibit regarding without prejudice negotiations (plaintiff's first affidavit)). The defendants however did not file any application under O. 41 r. 6 of the RC to expunge the averment and exhibit regarding without prejudice negotiations (plaintiff's first affidavit). Instead, the defendants' first affidavit replied to the averment and exhibit regarding without prejudice negotiations (plaintiff's first affidavit). Furthermore, the defendants' first affidavit:

(i) made further allegations and

(ii) exhibited screenshots of emails and WhatsApp messages

(a) regarding without prejudice negotiations.

[16] Based on the cases explained in the above sub-para. 14(iv), there is a waiver by the defendants as follows:

(i) the defendants did not apply to court under O. 41 r. 6 of the RC to strike out the averment and exhibit regarding without prejudice negotiations (plaintiff's first affidavit); and

(ii) the defendants' first affidavit expressly referred to without prejudice negotiations and exhibited screenshots of emails and WhatsApp messages regarding without prejudice negotiations.

[17] In view of the waiver, the defendants cannot now apply to strike out the averments and exhibits regarding without prejudice negotiations (plaintiff's second affidavit). Accordingly, encl. 7 is dismissed with costs (decision).

Stay Of Proceedings Pending Disposal Of Defendants' Appeal To Court Of Appeal Against Decision

[18] The OS is scheduled to be heard on 28 March 2019 (hearing date).

[19] After the decision was orally delivered by me on 6 March 2018, the defendants applied for a stay of the OS (defendants' stay application) pending their appeal to the Court of Appeal against the decision (defendants' appeal).

[20] The High Court has a discretion under s. 73 of the Courts of Judicature Act 1964 (CJA) read with r. 13 of the Rules of the Court of Appeal 1994 (RCA) to stay the OS pending the disposal of the defendants' appeal if the defendants are able to satisfy the High Court of the existence of special circumstances - please refer to the Court of Appeal's judgment delivered by Mohd Zawawi Salleh JCA (as he then was) in *Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd* [2013] 3 CLJ 47, at 58.

[21] I exercise my discretion under s. 73 of the CJA read with r. 13 of the RCA to allow the defendants' stay application because the defendants are able to discharge their burden to show the existence of special circumstances as follows:

(i) the defendants' appeal cannot be heard before the hearing date; and

(ii) if there is no stay of the OS, the OS will be decided on the hearing date. In such an event, the defendants' appeal will be rendered nugatory and this constitutes a species of special circumstances - please see *Maziah Musa v. Zainulabidin Mat Akhir, Dato' & Ors* [2014] 1 LNS 1034; [2014] 5 AMR 793, at [13(d)].

[22] The following order is made in allowing the defendants' stay application:

(i) the hearing of the OS is stayed pending the disposal of the defendants' appeal. Consequently, the hearing date is vacated and a case management date is fixed for the parties to update this court regarding the outcome of the defendants' appeal; and

(ii) costs of the defendants' appeal shall follow the event of the defendants' appeal.